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No. 01-560

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NEW YORK ASSOCIATION OF CONVENIENCE STORES, NATIONAL ASSOCIATION OF CONVENIENCE STORES, AND M.W.S. ENTERPRISES, INC.,

Petitioners,

v.

ALAN J. ROTH, COMMISSIONER OF THE DEPARTMENT OF TAXATION, and FINANCE OF THE STATE OF NEW YORK, and THE DEPARTMENT OF TAXATION and FINANCE OF THE STATE OF NEW YORK,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Contrary to Respondents' arguments, this case presents a square conflict concerning the test that courts should apply to determine whether laws or policies that treat Native Americans differently than non-Native Americans are constitutional. More specifically, the issue is whether such disparate treatment must be rationally related to "Congress' unique obligation to Native Americans," or whether any legitimate governmental interest is sufficient. The New York Court of Appeals and District of Columbia Circuit have applied the latter, traditional rational basis test. The Fifth, Eighth, and Ninth Circuits and the Maine and Vermont Supreme Courts, on the other hand, have held that equal protection requires application of the former, more tailored inquiry as dictated by this Court's decision in *Morton v. Mancari*, 417 U.S. 535, 555 (1974), and, in some cases, have expressly recognized the confusion among the lower courts on precisely this question. The significance of this distinction in the context of this case cannot be overstated – the preference at issue would have been struck down had the New York court applied *Mancari* rather than the lower rational basis test. This case therefore squarely and cleanly presents the equal protection issue that has generated this confusion among the state and federal courts and, thus, is an ideal vehicle for the resolution of the conflict.

1. Decisions by the New York Court of Appeals and District of Columbia Circuit in cases challenging the special treatment of Native Americans form one side of the conflict, both courts flatly holding that judicial review of such laws requires only "ordinary" rational basis scrutiny. The consequence of this conclusion in both cases was that governmental action that was rationally tied to state interests was upheld even though such interests were completely unrelated to furthering Congress' unique obligations toward Native Americans.

The decision below provides perhaps the starkest example because the New York Court of Appeals concluded that "any reasonably conceivable state of facts" could provide a rational basis for the State's policy favoring Native Americans. Applying this standard, the New York Appellate Division thus upheld the State's policy of forbearance in enforcing statutorily-mandated sales tax collection requirements based solely on the prevention *off of the Indian reservations* of the "civil unrest, personal injuries and significant interference with transportation on the State highways" that Indians in New York perpetrated during the brief time when the interception and seizure laws were enforced against them. *New York Association of Convenience Stores v. Urbach*, 712 N.Y.S.2d 220, 222 (App. Div. 2000); Pet. App. B at 5a. Respondents' contention that the New York court arrived at this conclusion simply by applying *Mancari* is directly contradicted by the court's opinion, which expressly states that ordinary rational basis scrutiny was applied, *see id.*, and, moreover, defies logic. It is difficult to understand how maintaining the peace *off the reservation* can be viewed as furthering Congress' unique obligations to Native Americans. If it could, then *Mancari* would be a dead letter and this Court's requirement of looking to Congress' "treaty obligations [or] its responsibilities to the Indian tribes" would be meaningless. *Rice v. Cayetano,* 528 U.S. 495, 519-20 (2000) (reaffirming the continued centrality of *Mancari).*

Likewise, in *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335, 1341 (D.C. Cir. 1998), the D.C. Circuit upheld legislation prohibiting gambling on *Narragansett* lands based on two "appropriate" governmental purposes: Rhode Island's interest in regulating gambling and the fact that the State had jurisdiction over the lands in question. Satisfied that these interests were sufficient to satisfy the tenets of equal protection, the D.C.

Circuit refused to consider whether the legislation at issue furthered "Congress' unique obligation toward Native Americans" as *Mancari* requires. *Id.* at 1340-41.

On the other side of the conflict are the Fifth, Eighth, and Ninth Circuits and the Maine and Vermont Supreme Courts, which apply a test specifically reserved for laws or policies that are predicated on Native American classifications. The Ninth Circuit has expressly characterized this brand of scrutiny as derived from *Mancari* and, moreover, as "shielding only those statutes that affect uniquely Indian interests." *Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997), *cert. denied, Kawerak Reindeer Herders Ass'n v. Williams*, 523 U.S. 1117 (1998).[1] *See also Peyote Way Church of God, Inc. v. Thornburg*, 922 F.2d 1210, 1216 (5th Cir. 1991) (specifically premising constitutionality of exemption allowing tribal use of peyote on rational relationship to governmental objective of preserving Native American culture); *United States v. Aanerud*, 893 F.2d 956 (8th Cir. 1990) (upholding right to trap leeches specifically because tribes' right to hunt, fish and gather wild rice on reservation was "sufficiently tied to 'the fulfillment of Congress' unique obligation toward the Indians'"); *In re A.J.*, 733 A.2d 36, 38 (Vt. 1999) (upholding special treatment of federally recognized tribes under Indian

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[1] Respondents' attempt to drive a wedge between the test identified in *Williams* and the one the Ninth Circuit applied in *Alaska Chapter, Associated General Contractors, Inc. v. Pierce*, 694 F.2d 1162 (9th Cir. 1982), Opp. at 8-9, fails for two reasons. First, *Pierce* applied *Mancari*, not the ordinary rational basis test as Respondents contend, and specifically held that "the challenged [HUD regulation] is rationally related to the fulfillment of Congress' unique obligation toward Indians and Alaska Natives." *Pierce*, 694 F. 2d at 1170. Second, its premise rests on the erroneous equation of "Indian self-government" with the interest at issue in *Mancari* – Congress' unique obligation to Native Americans. The latter is broader and, in addition to tribal self-regulation, includes other Indian interests; this distinction is expressly recognized in *Williams*. *See* 115 F.3d at 665.

Child Welfare Act because purpose was to preserve culture of tribes that Congress has assumed the responsibility of protecting); and *In re Marcus S.*, 638 A.2d 1158, 1159 (Me. 1994) (specifically premising constitutionality of reduced burden of proof in Indian Child Welfare Act case on "special status" of Indians and corresponding goal of Act to protect Indian families from disruption).

In each of these state and federal cases, the court specifically considered whether the reasons underlying the laws or policies at issue were rationally tied to the fulfillment of Congress' unique obligations toward Native Americans. This application by the Fifth, Eighth and Ninth Circuits and the Supreme Courts of Vermont and Maine of a standard of review under which constitutionality turned on the relationship between the law and uniquely Native American concerns sharply differentiates these cases from the present case and the D.C. Circuit's decision in *Narragansett* where this essential factor was eliminated from the analysis.

Respondents' attempt to characterize these two conflicting approaches as merely a matter of semantics is unavailing. That the *Mancari* test does not carry a name tag identifying it as a "fourth level" of scrutiny is irrelevant to the question presented for review. *See* Opp. at 10-11. Nor is it significant that courts that have applied traditional rational basis scrutiny have cited *Mancari* or even that they have referred to that standard as a rational basis test. Indeed, it is exactly because this confusion exists in the lower courts that Petitioners seek this Court's review. Moreover, Petitioners readily agree that the *Mancari* test is similar to traditional rational basis scrutiny in that the required nexus between the law and its purpose must be "rational" as opposed to "narrow." The essential point, however, is that under the *Mancari* test – unlike under the traditional rational basis test that applies to other classifications – there can be only one legitimate purpose for a law that treats Native Americans

differently than non-Native Americans: the fulfillment of Congress' unique obligations toward Native Americans.[2]

The import of this distinction is further underscored by the conclusion of the court below, which gave a stamp of constitutional approval to a preference based on an interest that had nothing whatsoever to do with the preservation of Native American interests or the furtherance of Congress' unique obligations toward Native Americans. Had the New York court correctly applied *Mancari*, it would have struck down the State's policy of forbearance in enforcing the statutorily-mandated taxes, because the State's generalized interest in preventing violence on its streets off of the reservation cannot be tied rationally to the fulfillment of Congress' unique obligations toward Native Americans.

2. Respondents' attempt to align the conflicting cases cited by Petitioners by shifting the focus to whether the special treatment at issue was upheld in each case also is without merit. Opp. at 7-10. This argument sidesteps the question that Petitioners have presented to this Court for review – what the appropriate *standard of review* is for a law that premises such treatment on a Native American

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[2] If a law treating Native Americans differently is not rationally tied to Congress' obligations to Native Americans, then the basis for claiming that the differential treatment does not amount to a racial classification, *see Mancari*, 417 U.S. at 550, is nonexistent. Without this unique rationale, there is nothing to distinguish a preference for Native Americans from any other race-based preference. As indicated in the Petition, the potential for confusion over the proper application of the *Mancari* test is further exacerbated in the wake of the Court's decision in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), which flatly held that *all* racial preferences must be strictly scrutinized. Pet. at 20. Respondents' curious attempt to demonstrate that the decisions below do not conflict with *Adarand* not only misses Petitioners' point, but it underscores the potential for confusion resulting from the coexistence of these standards. Opp. at 6-7.

classification.[3] The import of this question is highlighted by the decisions below, where the application of a lower level of judicial scrutiny resulted in the approval of a policy that would not have survived scrutiny under the specific test enunciated in *Mancari*.

Moreover, Respondents' argument that the cases can be aligned based on whether the special treatment at issue in each case was upheld is untrue. In *Williams*, the Ninth Circuit expressly rejected the construction of the Reindeer Industry Act that the agency charged with implementing the Act proposed, because the agency's interpretation would have granted a preference to native Alaskans that was unrelated to "native land, tribal status, self- government or culture" and thus was unconstitutional under *Mancari*. *See* 115 F.3d at 663-65. Concluding that this construction therefore was not entitled to the deference that typically would be afforded to an administrative agency's interpretation, the Ninth Circuit determined that the Act did not preclude non-natives in Alaska from owning and importing reindeer. *Id.* at 666.

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[3] Respondents cite Supreme Court Rule 10(b) and (c) and the Court's decision in *Yee v. City of Escondido, California*, 503 U.S. 519, 537-38 (1992), as support for their proposition that conflicting "results" of a case – presumably meaning its outcome – are what count for review on certiorari. To the contrary, this Court routinely grants certiorari to review conflicts in the application of legal standards. *See, e.g., TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 443 (1976) ("We granted certiorari because the standard applied by the Court of Appeals [for granting summary judgment] appeared to conflict with the standard applied by other Courts of Appeals."); *see also* Rule 10(b) and (c) (indicating that considerations include a decision by a state court of law resort on "an important federal question"). Moreover, nothing in *Yee* indicates that applications of different standards of review do not constitute a conflict; in fact, the observation that Respondents cite is simply that the lower courts had not reached conflicting results on the particular question that the petitioners' raised but on a different question.

3. Respondents' contention that the New York courts' decisions are consistent with the Court's precedent simply because this Court has never *required* that States collect taxes on reservation sales of fuel and cigarettes to non-Native Americans completely misses the mark. Opp. Br. at 12-13 (citing *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 425 U.S. 61, 78 (1994) (upholding the New York tax statutes and regulations at issue in this case); *Oklahoma Tax Commission v. Citizen Band of Potawatami Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991) (recognizing States' authority to collect taxes on reservation sales to non-Indians); and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161-62 (1980) (same)). Indeed, the mere fact that "*Attea, Potawatomi* and *Colville* [] do not mandate that States collect taxes on reservation sales of cigarettes and gasoline to non-Indians in order to comply with the dictates of the Equal Protection Clause," Opp. at 13, only begs the question. Respondents themselves highlight this flaw in their own analysis: "*Attea* was not an equal protection case and accordingly did not address any equal protection ramifications of respondents' subsequent determination not to enforce the regulations." Opp. at 12.

This case presents the ideal vehicle for addressing those equal protection ramifications and for resolving the conflict over the appropriate standard of review for a law or policy that treats Native Americans differently than non-Native Americans. This Court already has found that the application of the New York tax regulations at issue here to Native Americans is constitutionally permissible. *Milhelm Attea,* 425 U.S. at 75-78. After years of litigation by the State to establish that very point, there can be no credible argument that tribal sovereignty concerns compel a different conclusion. Accordingly, this case presents a clear set of facts to resolve the square conflict over whether a State's assertion of an interest other than one that furthers Congress'

obligation toward Native Americans to justify a law or policy that singles out Native Americans for special treatment violates the Equal Protection Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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